Supreme Court, U.S.
FILED

992078 JUN 26 2000

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ARNOLD PAUL PROSPERI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Counsel of Record
MIGUEL A. ESTRADA
ANDREW S. TULUMELLO
CURTIS E. GANNON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

122 pp

QUESTIONS PRESENTED

1. Whether Federal Rule of Evidence 606(b), which prohibits jurors from testifying about their deliberative processes "[u]pon an inquiry into the validity of a *verdict*," prevents a district court from conducting an inquiry into juror misconduct that comes to light before a verdict has been returned.

2. Whether, consistent with *Allen v. United States*, 164 U.S. 492 (1896), and its progeny, a trial court faced with a deadlocked jury may instruct that jury to continue its deliberations without taking any other action to ensure that jurors who favor acquittal will not surrender their conscientiously-held beliefs.

3. Whether a conviction under the federal counterfeiting statute, 18 U.S.C. § 513(a), can be sustained absent a showing that the counterfeited obligation is similar to a genuine obligation.

PARTIES TO THE PROCEEDINGS

All of the parties to the proceedings in the court below are included in the caption on the cover page of this petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTE, AND FEDERAL RULE INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 10

I. The Federal Courts Of Appeals Are Divided Regarding The Scope Of Federal Rule Of Evidence 606(b) 11

II. The Federal Courts Of Appeals Are Divided Regarding The Permissibility Of The Supplemental Jury Charge Given In This Case 18

III. The Decision Below Departs From The Established Tradition That A "Counterfeit" Must Be Similar To A Genuine Original And Interferes With Congress's Enforcement Scheme 26

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 24a

APPENDIX C 43a

APPENDIX D 44a

APPENDIX E 48a

TABLE OF AUTHORITIES

CASES

Page(s)

Allen v. United States, 164 U.S. 492 (1896).....*passim*

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991).....27

Beck v. Prupis, 120 S. Ct. 1608 (2000).....27, 28

Brasfield v. United States, 272 U.S. 448 (1926).....21

Burton v. United States, 196 U.S. 283 (1905).....21, 24

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).....18

First Nat'l Bank v. Russell, 657 F.2d 668 (5th Cir. 1981).....29

Francis v. Franklin, 471 U.S. 307 (1985).....24

Government of the Virgin Islands v. Hernandez, 476 F.2d 791 (3d Cir. 1973).....23

Hyde v. United States, 225 U.S. 347 (1912).....24

Jenkins v. United States, 380 U.S. 445 (1965).....19, 24

Johnson v. United States, 120 S. Ct. 1795 (2000).....28

Koon v. United States, 518 U.S. 81 (1996).....18

Lowenfield v. Phelps, 484 U.S. 231 (1988).....*passim*

Morissette v. United States, 342 U.S. 246 (1952).....27

Ortega-Rodriguez v. United States, 507 U.S. 234 (1993).....25

Remmer v. United States, 347 U.S. 227 (1954).....18

Richardson v. Marsh, 481 U.S. 200 (1987).....24

Rushen v. Spain, 464 U.S. 114 (1983).....16

SEC v. Lauer, 52 F.3d 667 (7th Cir. 1995).....29

TABLE OF AUTHORITIES—Continued

Page(s)

Smalls v. Batista, 191 F.3d 272 (2d Cir. 1999) 20, 21, 25

Smith v. Phillips, 455 U.S. 209 (1982) 16

Tanner v. United S ıtes, 483 U.S. 107 (1987) 11, 15, 16

Thomas v. Arn, 474 U.S. 140 (1985) 25

United States v. Abrams, 137 F.3d 704 (2d Cir. 1998) 12

United States v. Beard, 161 F.3d 1190 (9th Cir. 1998) 12

United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994) 13

United States v. Bruscino, 687 F.2d 938 (7th Cir. 1982) 14

United States v. D'Antonio, 801 F.2d 979 (7th Cir. 1986) 23

United States v. Davis, 1 F.3d 1014 (10th Cir. 1993) 15

United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969) 23

United States v. Gypsum, 438 U.S. 422 (1978) 24

United States v. Hernandez-Albino, 177 F.3d 33 (1st Cir. 1999) 22, 23

United States v. Herndon, 156 F.3d 629 (6th Cir. 1998) 14, 15

United States v. Kramer, 955 F.2d 479 (7th Cir. 1992) 23

United States v. Mason, 658 F.2d 1263 (9th Cir. 1981) 21

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Mitchell, 720 F.2d 370 (4th Cir. 1983)..... 22

United States v. Norton, 867 F.2d 1354 (11th Cir. 1989)..... 9

United States v. Nwaneri, 74 F.3d 1234, 1996 WL 15468 (4th Cir. 1996)..... 22

United States v. Olano, 507 U.S. 725 (1993)..... 16

United States v. Resko, 3 F.3d 684 (3d Cir. 1993)..... 12, 13

United States v. Rogers, 289 F.2d 433 (4th Cir. 1961)..... 21, 22

United States v. Rowe, 144 F.3d 15 (1st Cir. 1998)..... 12

United States v. Sababu, 891 F.2d 1308 (7th Cir. 1989)..... 14

United States v. Scott, 547 F.2d 334 (6th Cir. 1977)..... 22

United States v. Sotelo, 97 F.3d 782 (5th Cir. 1996)..... 13, 14

United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998)..... 14

United States v. Strothers, 77 F.3d 1389 (D.C. Cir. 1996)..... 23

United States v. Thibodeaux, 758 F.2d 199 (7th Cir. 1985)..... 23

United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971)..... 23

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Warren, 594 F.2d 1046 (5th Cir. 1979) 23

STATUTES, REPORTS AND RULES

18 U.S.C. § 513 ..... *passim*
18 U.S.C. § 514 ..... 28, 29
18 U.S.C. § 871 22
18 U.S.C. § 1341 1
18 U.S.C. § 2113(b) 22
26 U.S.C. § 7206(1) 1, 4
28 U.S.C. § 1254(1) 1
S. REP. NO. 97-307 (1981) 28
141 CONG. REC. S9534 (daily ed. June 30, 1995) 29
FED. R. EVID. 606 ..... *passim*

OTHER AUTHORITIES

8 WIGMORE ON EVIDENCE (1961) 16
Black's Law Dictionary (5th ed. 1979) 27
Black's Law Dictionary (6th ed. 1990) 27
1 John Bouvier, *A Law Dictionary* (1839) 27
3 *Oxford English Dictionary* (2d ed. 1989) 27

PETITION FOR A WRIT OF CERTIORARI

Petitioner Arnold Paul Prosperi respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 201 F.3d 1335. The order of the district court granting a judgment of acquittal on the counterfeiting counts (App., *infra*, 24a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2000. A timely petition for rehearing was denied on March 30, 2000. App., *infra*, 43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTE, AND FEDERAL RULE INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States, 18 U.S.C. § 513, and Federal Rule of Evidence 606 are reproduced at App., *infra*, 44a-47a.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of filing false tax returns, 26 U.S.C. § 7206(1), and on three counts of "mak[ing], utter[ing], or possess[ing]" counterfeited securities in violation of 18 U.S.C. § 513(a). The district court granted petitioner's post-trial motion for judgment of acquittal on the counterfeiting charges. The court of appeals affirmed petitioner's conviction on the tax counts and, on the Government's cross-appeal, reinstated the convictions on the counterfeiting counts.

1. In 1979, petitioner Arnold Paul Prosperi, a real estate attorney in West Palm Beach, Florida, was introduced to Patrick Donovan, a citizen of the Republic of Ireland. Donovan, a wealthy, retired businessman with bank accounts in the Channel Islands, Liechtenstein, and Switzerland, wanted to make real estate investments in the United States. Donovan advised Prosperi that his investments in the United States were to be kept secret, and he authorized Prosperi to establish an offshore corporation as an investment vehicle in order to assure complete anonymity. App., *infra*, 2a.

Pursuant to Donovan's instructions, Prosperi created Amaretto Corporation ("Amaretto"). Prosperi also obtained and held from the very inception of the corporation, with Donovan's written consent, a power of attorney that authorized Prosperi to act for Amaretto in all of its business affairs. That instrument authorized Prosperi to "do and perform any and all acts and deeds whatsoever as [he] shall consider proper and expedient in the management, supervision, and conduct" of Amaretto's business, and included the authority to buy and sell real estate and to make and recall loans. Tr. 3303-08. Prosperi managed the affairs of Amaretto pursuant to that power of attorney, for the benefit of Patrick Donovan, from 1979 through 1995. App., *infra*, 2a.

During the 1980s, Prosperi participated in two major real estate transactions on behalf of Amaretto. The first involved the 1985 purchase, renovation, and subsequent sale of residential property at 143 East Inlet Drive in Palm Beach, Florida ("the Inlet property"). Donovan and Prosperi agreed to purchase the Inlet property as partners. Under the terms of their arrangement, Amaretto paid 50% of the purchase price and loaned Prosperi money to purchase the other 50% share. Tr. at 3321-22. Once Prosperi paid off the loan, and Amaretto was paid a return on its investment, all profits from the sale of the Inlet Drive property were to be divided equally between Amaretto and Prosperi. App., *infra*, 2a.

The second transaction involved the purchase and subsequent sale of a golf course owned by Amaretto to the United States Department of Veterans Affairs ("the Holigolf transaction"). Acting for Amaretto, and in consultation with Donovan, Prosperi closed the sale of the golf course in 1989 after years of painstaking negotiation. Tr. 3391-99. The sale proceeds of $3,050,000 were deposited into an Amaretto Citicorp savings account. Prosperi, exercising the authority vested in him by the power of attorney, withdrew $50,000 as a fee for his work on the transaction. App., *infra*, 3a n.1. Prosperi also withdrew additional funds from the Amaretto account and deposited them into his own accounts. Prosperi testified at trial that the money was a loan from Amaretto to him, intended to finance other real estate transactions, and that Donovan had authorized the loan, as he had done with respect to the loan used to purchase Prosperi's 50% interest in the Inlet property. Tr. 3451-52.

2. In June 1994, the criminal division of the Internal Revenue Service ("IRS") opened an investigation into Amaretto as a result of Amaretto's failure to pay withholding taxes on the sale proceeds from the Holigolf transaction. Tr. 141-42. Although the IRS ultimately concluded that Amaretto had no obligation to withhold taxes on that transaction, agents came to suspect during the investigation that Prosperi was diverting funds from Amaretto for his own use. Agents interviewed Prosperi about the tax aspects of the Holigolf transaction and about the Amaretto funds Prosperi had transferred into his accounts. Prosperi cooperated with the IRS investigation and told agents that the monies he withdrew from the Amaretto account were loans from Amaretto that had been approved by Amaretto's beneficial owner. Tr. 165, 3630-45.

The IRS eventually discovered that Donovan was the beneficial owner of Amaretto, and agents contacted him to discuss the tax dimensions of the Holigolf transaction. At first Donovan denied his relationship with Amaretto, but he subsequently admitted owning the corporation. Donovan

told the IRS that he had been completely unaware of the loans Amaretto had made to Prosperi, and he promised to cooperate with the agents' investigation. App., *infra*, 3a. Donovan ultimately produced to the Government counterfeit securities and falsified bank statements that Prosperi purportedly had given to him, as well as tapes of certain of his phone conversations with Prosperi about the status of the IRS investigation into Amaretto and the monies Prosperi had withdrawn from the Amaretto accounts. At no time during the investigation did Donovan disclose to the IRS that he had not paid personal or corporate income taxes in Ireland for over 20 years, that he concealed funds from Irish tax authorities by maintaining accounts under different names in foreign countries, or that his interest in purportedly aiding United States authorities stemmed from his grave concern that the IRS investigation into Amaretto might spark a parallel tax investigation into his holdings by Irish authorities, a danger that he hoped to minimize by disavowing actions taken by Prosperi on his behalf. Tr. 505-28, 562-94.

3. In September 1996, a grand jury indicted Prosperi on two counts of mail fraud, 18 U.S.C. § 1341 (Counts 1 and 2); three counts of counterfeiting securities, 18 U.S.C. § 513 (Counts 3, 4, and 5); eight counts of money laundering 18 U.S.C. §§ 1956-57 (Counts 6, 7, 8, 9, 10, 11, 12, and 13); and two counts of filing false tax returns, 18 U.S.C. § 7206(1) (Counts 14 and 15). In June 1997, the indictment was superseded to revise the money laundering counts and to add a forfeiture count (Count 16).

The indictment alleged that Prosperi misappropriated proceeds from the Holigolf transaction while advising Donovan that the funds were invested in certificates of deposit ("CDs"). Relying on the documents produced by Donovan, the indictment further alleged that Prosperi created false documents purporting to be CDs issued by the J.P. Morgan bank and Morgan Guaranty Trust, and that he had shown those documents to Donovan to conceal his deceit.

The tax counts charged Prosperi with failing to report the monies he allegedly stole from Amaretto on his 1989 and 1990 federal income tax returns. App., *infra*, 3a-4a.

The case proceeded to trial in September 1997. The Government's case rested largely on Donovan's testimony. Donovan testified that he was unaware that loans had been made from Amaretto to Prosperi, and that Prosperi had presented him with various counterfeit obligations during their annual meetings. *Id.* at 4a. On cross-examination, Donovan conceded that he had voluntarily formed a partnership with, and loaned money to, Prosperi in connection with the purchase and sale of the Inlet property; that he had lied to law enforcement agents about his involvement with Amaretto out of fear that his tax fraud would be exposed to Irish authorities; that he owed at least $4 million in unpaid taxes to the Irish Government; and that IRS agents had suggested they might protect him from an investigation in Ireland. Tr. 622-27, 681-707, 749-52. Donovan was also forced to concede that he did not produce the counterfeit instruments to law enforcement agents until some five months after he first decided to "cooperate" with them, and that it was not until three days before Prosperi's trial that he disclosed to the United States Attorney his massive tax liabilities in Ireland. Tr. 737-44, 775-77. The prosecutor acknowledged in summation that his star witness was "no angel[.]" Tr. 4671.

Prosperi testified in his defense that Donovan had consented to the loans he had taken from Amaretto and that Donovan in fact had encouraged Prosperi to hold properties and other assets in Prosperi's name in order to protect the secrecy of Donovan's investments in the United States. Tr. 3288-89, 3306. Prosperi also testified that he did not create the counterfeit obligations that had been produced to the U.S. authorities by Donovan and contended that Donovan had manufactured them in an effort to deflect attention from his *own* tax machinations and liabilities in Ireland while he tried

to negotiate a settlement of his tax liabilities with Irish authorities. Tr. 3740-43, 4708-12.

4. At the close of the evidence, the district court granted Prosperi's motion for judgment of acquittal on 10 of the 15 counts in the indictment: the mail fraud counts (Counts 1-2), and the money laundering counts (Counts 6-13). The district court concluded that the Government had failed to prove that the mailings charged in the indictment furthered the purportedly fraudulent scheme Prosperi was said to have orchestrated. The counterfeiting (Counts 3-5) and tax fraud (Counts 14-15) counts relating to the Holigolf transaction were the *only* charges submitted to the jury. App., *infra*, 4a.

In the evening of the second day of deliberations, Bonnie Huffman, a dismissed alternate juror, contacted defense counsel and reported that juror Morris Levy had predetermined Prosperi's guilt and had engineered the election of a like-minded juror as foreperson well before the close of the evidence. *Id.* at 5a. Huffman also informed defense counsel that juror Marilyn Budd had called her in tears, complaining that Levy was attempting to coerce her into voting for a conviction. Huffman reported that the jury was split 10-2 in favor of conviction, with Budd and another juror favoring acquittal. *Id.* at 50a.

Defense counsel apprised the district court of these developments during deliberations and requested that the court conduct a hearing into the reported juror misconduct. The district court determined that, under Federal Rule of Evidence 606(b), it had no authority to conduct a hearing, stating "[t]he only thing that I can really consider under Rule 606(b) is an outside influence and . . . this doesn't involve outside influence." *Id.* at 67a. The district court reminded the jurors to discuss the case only among themselves.

During a recess later that morning, defense counsel observed juror Budd crying outside the courtroom. App., *infra*, 55a. Defense counsel immediately apprised the district court of what he had seen and requested that the district court remind the jurors of their right during deliberations to adhere

to their honestly-held convictions. The district court denied that request, stating that further instruction would be necessary only if "I get a note from the jury that says they are deadlocked or need further instruction." *Id.* at 56a.

That same day, the jury sent three notes to the trial judge. The first requested a read-back of Prosperi's testimony regarding "loan" notations that Prosperi had made on certain of Amaretto's documents. *Id.* at 57a. The second question asked "is there a legal definition relating to the tax returns for the concept of a loan." *Id.* at 62a. Both notes reflected the jury's focus on the central issue raised by the tax counts. As the district court instructed the jury, loans are not taxable income and are not required to be reported on federal income tax statements. Thus, if the jury were to find that the monies transferred from the Holigolf transaction to Prosperi were loans, it would be obliged to acquit Prosperi on those charges.

Shortly after the district court responded to those requests, the jury sent out a third note. That note indicated that a verdict had been reached on the counterfeiting counts (Counts 3, 4, and 5), but that the jury was unable to reach a verdict on the tax counts (Counts 14 and 15), and could see no likelihood of a "change in the near future." App., *infra*, 64a-65a. Over defense counsel's objection, the district court instructed the jury as follows: "Members of the jury, please continue to deliberate on counts 14 and 15." *Id.* at 65a. No instruction regarding the jurors' right and duty to adhere to their honestly-held convictions was given, even though the district court was aware that two jurors had been holding out for an outright acquittal. *Id.* at 50a.

Following that instruction, and during a court recess, two witnesses informed defense counsel that they saw juror Levy take juror Budd aside and that the two engaged in a heated disagreement away from the other jurors. *Id.* at 67a. Defense counsel again apprised the trial judge of these reports and proffered that he now could establish, through two independent witnesses, a "prima facie case . . . that jurors

are violating the court's instructions." *Ibid.* Defense counsel *again* requested that the district court conduct an inquiry and *again* the district court denied the request, invoking Rule 606(b). *Ibid.*

The next morning—now the third day of deliberations—the prosecutor requested that the district court interview Huffman, the dismissed alternate, regarding her conversations with juror Budd. The prosecutor stated that Huffman's statement *to* Budd constituted a potential "extraneous" taint warranting investigation, but reasserted the Government's view that Huffman's reports of jury coercion were not proper subjects of inquiry. App., *infra*, 71a. Defense counsel requested that the district court examine Huffman regarding Budd's account of intimidation in the jury room to ascertain whether the reports of juror misconduct were credible. *Id.* at 80a. Relying on Rule 606(b), the district court refused to question Huffman on any topic other than what Huffman told Budd. *Ibid.* Huffman testified only that she had told Budd to "stick by what you believe in." *Id.* at 78a.

5. The jury returned a guilty verdict on all counts. Prosperi filed a motion for a judgment of acquittal on the counterfeiting counts on the ground that the Government did not prove that the J.P. Morgan CDs that Prosperi purportedly gave to Donovan bore a sufficient resemblance to genuine CDs in order to qualify as "counterfeited" within the meaning of 18 U.S.C. § 513. The district court granted the motion and entered an order granting acquittal as to Counts 3-5. App., *infra*, 24a-42a.

The district court observed that the legislative history of section 513 plainly evidenced Congress's intent to incorporate the "similitude" requirement that applied to counterfeiting offenses at common law. Under that standard, the district court explained, 18 U.S.C. § 513(a) mandated proof of physical resemblance between the counterfeit and genuine obligations. *Id.* at 33a. The Government did not carry its burden of proof on that point, the district court

concluded, because the jury was "not provided [with] a valid CD with which to compare the phony." *Id.* at 38a.

6. The court of appeals affirmed Prosperi's tax convictions and, on the Government's cross-appeal, reversed the district court's judgment of acquittal on the counterfeiting counts. App. *infra*, 1a-23a.

Like the district court, the court of appeals analyzed the juror-misconduct claim under Fed. R. Evid. 606(b). The court of appeals believed that Rule 606(b) grants district courts "discretion" to investigate claims of juror misconduct, but suggested that such discretion does not extend to "allegations of internal influence occurring during deliberations." *Id.* at 7a. Thus, while the district court correctly "investigated the possibility of *external* influence *by* the excused alternate" (*ibid.*; emphasis added), the court of appeals concluded that the district court could not possibly abuse its discretion in failing to investigate reports of premature deliberations, prejudgment of the accused's guilt, and coercion because those instances of "juror misconduct . . . were entirely endemic to the deliberations." *Ibid.* Indeed, the court of appeals believed *any* investigation by the district court in those circumstances would "have invited reversible error." *Ibid.*, *citing United States v. Norton*, 867 F.2d 1354, 1366 (11th Cir. 1989).

The court of appeals also rejected Prosperi's contention that the instruction to the jury to "continue to deliberate" constituted reversible error. Prosperi contended that the supplemental charge was a truncated "*Allen*" charge that lacked the requisite admonition that jurors should not compromise their conscientiously-held views simply to secure a verdict. *See Allen v. United States*, 164 U.S. 492 (1896). The court of appeals explained that the instruction was not an *Allen* charge but rather a simple "request" that the jury continue deliberating, and held that the charge was not "inherently coercive" because the trial court was "unaware of the composition of the jury's nascent verdict" and the charge

did not suggest that "a particular outcome was either desired or required." App., *infra*, 8a.[1]

Finally, the court of appeals held that in enacting section 513 Congress broke from the common law tradition by defining the term "counterfeited" in the statute. That statutory definition, the court of appeals opined, did not contain a similitude requirement and was unambiguous on its face, making reference to the legislative history, upon which the district court had relied, or to other federal counterfeiting statutes, which do impose a similitude requirement, unnecessary. *Id.* at 12a.

REASONS FOR GRANTING THE WRIT

This petition presents three important and recurring issues critical to the proper administration of the criminal justice system. Those issues are: (1) the degree to which a district court is prohibited by Federal Rule of Evidence 606(b) from investigating jury irregularities *before* a verdict has been returned; (2) the propriety under the federal constitution as well as under this Court's supervisory authority of a supplemental charge to a deadlocked jury that omits some admonition intended to assure that jurors who favor acquittal will not relinquish their honestly-held convictions solely to achieve a verdict; and (3) whether the federal counterfeiting statute, 18 U.S.C. § 513(a), requires proof of the "similitude" between the genuine and counterfeit obligation. The Eleventh Circuit's ruling on the first two issues squarely conflicts with the decisions of other courts of appeals, and, as the Eleventh Circuit conceded, its ruling on the "similitude" question departs from the rule followed by "virtually every court of appeals" (App., *infra*, 10a) with respect to

---

[1] In making that determination, the court of appeals apparently overlooked Huffman's report that the jury was divided 10-2 in favor of conviction before the jury reported it had reached an impasse. App., *infra*, 50a.

counterfeiting offenses. Plenary review is therefore warranted.

I. The Federal Courts Of Appeals Are Divided Regarding The Scope Of Federal Rule Of Evidence 606(b)

The court of appeals upheld the district court's conclusion that it lacked discretion under Rule 606(b) to conduct a preverdict hearing on the allegations of "internal" juror misconduct. That decision contradicts the text and purpose of Rule 606(b), conflicts with the decisions of other courts of appeals, and needlessly restricts the scope of a district court's authority to investigate credible allegations of serious jury irregularities during trial. Review by this Court is essential to restore clarity to this important area of federal criminal procedure.

1. By its terms, Federal Rule of Evidence 606(b) forbids jurors from testifying as to what occurred during their deliberations in the event there is "an inquiry into the validity of [the] verdict." Fed. R. Evid. 606(b). The Rule "is grounded in the common-law rule against admission of juror testimony to impeach a verdict" (*Tanner v. United States*, 483 U.S. 107, 121 (1987)) and, like the common law rule, Rule 606(b) provides that a juror may nonetheless testify on the narrow question "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid 606(b); *see also Tanner*, 483 U.S. at 121. Thus, in situations to which it applies, Rule 606(b) draws a sharp distinction between influences intrinsic to the deliberation process and "outside" or "external" influences that may have affected that process. "Upon an inquiry into the validity of a verdict" (Fed. R. Evid. 606(b)), only the latter types of influence may be examined by the courts.

By holding that Rule 606(b) provides the appropriate framework for investigating *pre-verdict* claims of juror misconduct, the Eleventh Circuit imported into the analysis of

such claims the dichotomy between "external" and "internal" influences that Rule 606(b) prescribes; indeed, the Eleventh Circuit opined that a district court ordinarily would *err* if it elects to investigate any pre-verdict allegation of improper "internal" influences. Most courts of appeals that have considered the question, however, hold that Rule 606(b) does not impose *any* limitation on a district court's discretion to investigate irregularities—of either the "external" *or* "internal" variety—in the jury's deliberations that come to light *before* a verdict has been returned. Indeed, several courts of appeals rule on such claims without even adverting to Rule 606(b), correctly recognizing that the rule has no bearing on the question. *See, e.g.*, *United States v. Rowe*, 144 F.3d 15, 19-20 (1st Cir. 1998) (allegations of juror bias raised during deliberations); *United States v. Abrams*, 137 F.3d 704, 708 (2d Cir. 1998) (allegations of premature deliberation raised during trial); *United States v. Beard*, 161 F.3d 1190, 1193-94 (9th Cir. 1998) (allegations of juror intimidation raised during deliberations).

Several courts of appeals have also expressly rebuffed the Government's attempt to invoke Rule 606(b) as a bar to investigation of juror misconduct that comes to light before a verdict has been returned. In *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993), for example, the Third Circuit held that a new trial was required where the district court failed adequately to investigate "internal" misconduct that was discovered during trial. In *Resko*, a member of the jury told a court official on the seventh day of a nine-day trial that jury members had been discussing the case during recesses and while waiting in the jury room. *Id.* at 686. Resko moved for an individualized *voir dire* of the jury, and the district court directed jurors to answer a questionnaire that sought to ascertain the degree to which each had engaged in premature deliberation. *Ibid.* Every juror admitted to having done so, but the questionnaire did not request the jurors to disclose the topics they had discussed or the length of their conversations. *Ibid.* The district court concluded without further

investigation that the misconduct had not prejudiced Resko and his co-defendant. *Id.* at 690.

The Third Circuit reversed and ordered a new trial, holding that the district court did not have "enough information to make a reasoned determination that the defendants would suffer no prejudice due to the jury misconduct." *Id.* at 691. Explaining that "it is far easier for a district court to address allegations of jury misconduct when they come to light mid-trial rather than after the verdict has been entered," *id.* at 694, the Third Circuit held that Rule 606(b) does *not* limit a district court's ability to conduct a thorough investigation of the reported irregularities:

> [T]here is a doctrinal distinction between those situations in which evidence of intra-jury misconduct comes to light during trial and those situations in which such evidence is discovered only after the verdict has been entered. In the latter context, Fed. R. Evid. 606(b) prohibits a juror from testifying about such intra-jury influences *although it imposes no such proscription before the verdict has been entered.*

Id. at n.9 (emphasis added); *see also United States v. Bertoli*, 40 F.3d 1384, 1395 n.5 (3d Cir. 1994) (noting trial court erred in construing Rule 606(b) as a bar to investigating juror misconduct because "the court was not inquiring into the validity of a verdict").

The Fifth Circuit reached a similar conclusion in *United States v. Sotelo*, 97 F.3d 782 (5th Cir. 1996), where it held that Rule 606(b) does not restrict a district court's discretion to investigate "intrinsic" juror misconduct before a verdict has been returned. In *Sotelo,* a juror stepped out of the jury room during deliberations and informed the court security officer that she was upset by racial remarks made by some of the other jurors. After conferring with the parties, the district court brought the entire jury into the courtroom and questioned the offended juror about her allegations. *See id.* at 795-96. In reviewing the propriety of the district court's investigation into the reports of misconduct, the court of

appeals noted that "[f]ocus on the briefs on Rule 606(b) is misplaced." *Id.* at 797. "Since the problem was brought to the court's attention prior to verdict," the Fifth Circuit explained, "606(b) does not impact the availability of juror testimony in resolving the factual issues raised . . . . and [does not help] resolve the real issue in this case which was brought to the court's attention pre-verdict." *Ibid.*

The Seventh Circuit also has held that Rule 606(b) does not apply to allegations of juror misconduct raised during trial. In *United States v. Sababu*, 891 F.2d 1308, 1333 (7th Cir. 1989), the Seventh Circuit held that the district court erred in relying on Rule 606(b) in refusing to conduct a *voir dire* of the jury about a transcript that was not admitted into evidence but was mistakenly placed in the exhibit binders sent to the jury room. The Seventh Circuit reasoned that "the judge was requested to question the jurors *during* their deliberations and *before* they reached a verdict." *Id.* at 1335 (emphasis in original). "In such a situation," the court of appeals observed, "the Rule is *inoperative* and the trial judge was not restricted by it from conducting a *voir dire* of the jury as to the effect of the transcript on the deliberations." *Ibid.* (emphasis added); *see also United States v. Stafford*, 136 F.3d 1109, 1113 (7th Cir. 1998) (noting that request to investigate intra-juror misconduct should have been made before verdict was returned; under Rule 606(b), the request made post-verdict came "too late"); *United States v. Bruscino*, 687 F.2d 938, 941 (7th Cir. 1982) (Rule 606(b) prohibits district court from "questioning the jurors, *after* they have given their verdict, to determine whether their deliberations were prejudiced") (emphasis added).

By contrast, the Sixth and Tenth Circuits, like the Eleventh Circuit in this case, believe that Rule 606(b) provides the correct framework for analyzing misconduct issues that come to light before there is a verdict. In *United States v. Herndon*, 156 F.3d 629 (6th Cir. 1998), the Sixth Circuit held that a district court abused its discretion in failing adequately to investigate a juror who recollected

during deliberations that he may have had prior business dealings with the defendant. *Id.* at 634. In reversing the defendant's conviction, however, the Sixth Circuit analyzed the propriety of the district court's limited investigation under the rubric of Rule 606(b) jurisprudence, engaging in an extensive analysis of whether past associations are properly characterized as "internal" or "external" influences. Similarly, the Tenth Circuit has explained that in responding to allegations of "internal" misconduct raised during deliberations, "[i]nquiry into such matters, *within the limitations of Fed. R. Evid. 606(b)* . . . is the appropriate method" to address them. *United States v. Davis*, 1 F.3d 1014, 1016 (10th Cir. 1993) (emphasis added).

The Eleventh Circuit's decision thus exacerbates the substantial conflict in the courts of appeals. The district court repeatedly invoked Rule 606(b) as a bar to *any* investigation of the "internal" misconduct that was brought to its attention, even though the allegations of misconduct were reported to it well before any verdict had been returned. In the Third, Fifth, and Seventh Circuits, Rule 606(b) would pose no barrier to investigation of those allegations, while in the Sixth, Tenth, and now the Eleventh Circuits, the district court would find itself without *any* authority to interrogate jurors about the scope of the misconduct and its prejudicial effect. That division of authority on so important an issue of federal criminal procedure warrants this Court's immediate review.

2. The Eleventh Circuit's decision not only frustrates a key policy goal of Rule 606(b), but also gives short shrift to the trial courts' overriding duty to ensure the observance of due process protections. Congress enacted Rule 606(b) with the clear expectation that judicial investigation into reported intra-juror misconduct would proceed unfettered by the dictates of the Rule. The legislative history provides ample evidence in support of that point. As passed by the House, Rule 606(b) deemed a broad range of juror testimony admissible. *Tanner*, 483 U.S. at 122-25. The Conference

rejected the House bill, but in doing so made clear that the Rule's limitation on post-verdict investigation into trial irregularity should be counterbalanced by encouraging jurors "to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations." *See* Advisory Committee's Notes to Subdivision (b), Fed. R. Evid. 606(b). Thus, "the legislative history demonstrates with uncommon clarity," *Tanner*, 483 U.S. at 125, that Congress expected prompt reporting by jurors, in conjunction with prompt investigation by judges, to assure that fair and regular trial procedures would be observed.[2]

Observance of such procedures—including prompt judicial inquiry into credible allegations of *ongoing* jury misconduct—is far more than a procedural nicety; it is a fundamental requirement of due process.[3] Yet under the Eleventh Circuit's expansive interpretation of Rule 606(b), a district court faced with credible reports that deliberating jurors are drinking alcohol, smoking marijuana, and ingesting cocaine—all of which constitute "internal" misconduct, *see Tanner*, 483 U.S. at 125—would be barred by that rule from

---

[2] Even the common law authorities on which Rule 606(b) was based maintained that "[t]he reasons for the . . . rule . . . disappear . . . if such investigation . . . is *made by the judge* and takes place *before the jurors' discharge* and separation." 8 WIGMORE ON EVIDENCE § 2350 at 691 (1961) (emphasis in original). Such an investigation would serve only to remedy "aberrations in the verdict before it has become a recorded finality[.]" *Ibid.*

[3] *See Smith v. Phillips*, 455 U.S. 209, 217 (1981) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, *and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.*") (emphasis added); *see also United States v. Olano*, 507 U.S. 725, 738 (1993) (same); *Rushen v. Spain*, 464 U.S. 114, 127 (1983) (Stevens, J., concurring) (noting that a criminal defendant has a due process right to a "mid-trial hearing" when credible allegations of jury partiality are raised).

investigating those allegations, because they relate to misconduct that is "entirely endemic to the deliberations." App., *infra*, 7a. A district court similarly would be precluded from investigating allegations of ongoing coercion or other physical abuse, racial bias, mental instability, or countless other improprieties properly characterized as "internal" under this Court's Rule 606(b) jurisprudence. For each of these examples, circumstances can be imagined in which a *voir dire* of the jury by the district court would not only be prudent but *indispensable* to meet due process requirements. The decision below, by examining the problem through the legally inapt framework of Rule 606(b), would foreclose that inquiry.

3. The accommodation of competing interests embedded in Rule 606(b) obliges jurors to report, and district courts to investigate, credible claims of misconduct *before* a verdict is returned. The district court plainly failed to discharge that duty here. After being advised by defense counsel of ongoing improprieties on *three* separate occasions, the district court determined, not that those reports were incredible or that they described acceptable conduct, but that investigation into them was *prohibited* by Rule 606(b). Because the allegations purportedly involved "internal" influences, the district court repeatedly stated that it lacked any legal authority to investigate. *See* App., *infra*, 53a ("[T]he only way you get that [hearing] is with illegal testimony under Rule 606(b)").[4] The court of appeals similarly began and ended its analysis with the proposition that the "discretion" that the district court enjoyed under the circumstances was "discretion *under Rule 606(b)*" (App., *infra*, 6a) (emphasis added), and on that basis accepted the

---

[4] *See also* App., *infra*, 67a ("The only thing you can even take a statement on is whether there is an outside influence."); *Ibid.* ("The only thing that I can really consider under Rule 606(b) is an outside influence and . . . this doesn't involve outside influence.").

district court's decision not to investigate the allegations of misconduct.

Because the district court and court of appeals both analyzed the problem through the framework of Rule 606(b), each misperceived the proper scope of the district court's authority. That error requires reversal, because the district court and the court of appeals analyzed the scope of a trial court's discretion on the basis of an erroneous legal premise. *See, e.g.*, *Koon v. United States*, 518 U.S. 81, 100 (1996) (a court "by definition abuses its discretion when it makes an error of law"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (same).[5] Thus, whatever "discretion" the district court had to address the allegations of misconduct was not exercised here, one way *or* the other, because the district committed legal error in believing that it had *no* discretion to investigate the reported misconduct in light of Rule 606(b). That conclusion—endorsed by the court of appeals—directly conflicts with the rule in other circuits. Because that issue is a recurring and important one that affects a district court's power to protect the integrity of the jury system, this Court should grant immediate review to resolve the circuit conflict.

II. The Federal Courts Of Appeals Are Divided Regarding The Permissibility Of The Supplemental Jury Charge In This Case.

The Eleventh Circuit's holding also exacerbates a division in the circuits regarding the propriety of modified *Allen* charges. Unlike the Eleventh Circuit, the vast majority of the courts of appeals have held that a supplemental charge to a

---

[5] Because the district court did not conduct a hearing, neither petitioner, nor any reviewing court, can know whether "what actually transpired, or whether the incidents that may have occurred[,] were harmful or harmless." *Remmer v. United States*, 347 U.S. 227, 229 (1954). Review and reversal are warranted on that ground as well.

deadlocked jury ordinarily *must* contain either an admonition that jurors need not surrender their honestly-held convictions simply to secure a verdict or some equivalent cautionary language calculated to ensure that jurors who would vote for acquittal will not be coerced into voting to convict simply for the sake of returning a unanimous verdict. That division in the lower courts warrants immediate resolution by this Court.

1. It is well recognized that jury deliberations constitute a critical stage of a criminal trial and that "[a]ny criminal defendant . . . being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). Indeed, this Court has emphasized that "the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration." *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (*per curiam*).

In *Allen v. United States*, 164 U.S. 492 (1896), this Court approved a jury instruction that directed jurors then holding dissenting views to reconsider their opinions in light of the views of the majority, and to decide the case unanimously if they could do so conscientiously. *Id.* at 498. Noting that the object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors, this Court endorsed that charge as embodying the common-sense proposition that a juror should approach deliberations with "deference" and "a distrust of his own judgment" if "he finds a large majority of the jury taking a different view of the case." *Id.* at 501-02.

In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), this Court affirmed "the continuing validity of [the] observations in *Allen*." *Id.* at 237-38. *Lowenfield* involved a challenge to a supplemental jury charge that in combination with a jury poll was said to have coerced a death sentence. The supplemental charge at issue encouraged each juror to re-examine his opinions but admonished the jury not to "surrender your honest belief as to the weight and effect of [the] evidence solely because of the opinion of your fellow jurors or for the

mere purpose of returning a verdict." 484 U.S. at 235. The Court held that "the combination of the polling of the jury and the supplemental instruction was not 'coercive' in such a way as to deny . . . a constitutional right." *Id.* at 241. The Court also made clear, however, that "other combinations of supplemental charges and polling might . . . require a different conclusion." *Ibid.*

2. In the years since *Lowenfield* was decided, the courts of appeals have confronted a multitude of challenges to supplemental jury instructions raising claims of jury coercion. Those courts have repeatedly emphasized that a supplemental charge can place undue pressure on minority jurors to surrender their sincerely-held beliefs, and most have required that a supplemental charge to a deadlocked jury contain a cautionary instruction that will ensure that minority jurors will not abandon their sincerely-held, dissenting views solely for the sake of reaching a verdict.

The Second Circuit—in a decision that squarely conflicts with the Eleventh Circuit's decision in this case—has concluded that a cautionary admonition is a requirement of federal due process. *See Smalls v. Batista*, 191 F.3d 272 (2d Cir. 1999). In *Smalls*, the trial court instructed a jury that had reported itself deadlocked eleven to one to "continue to discuss the case" and to "continue a free discussion." 191 F.3d at 275. The Second Circuit held that the instruction offended due process principles because it did not contain cautionary language "admonish[ing] the jurors not to surrender their own conscientiously held beliefs." *Id.* at 279. Although the prosecutor contended that the charge at issue was not an "*Allen*" charge at all because the trial court "never urged the jury to reach a verdict, but rather ordered them only to continue to deliberate, argue and discuss," *ibid.*, the Second Circuit squarely rejected that contention, holding that the cautionary language requirement extended to "*any Allen*-type charge," which it defined as "a generic term used for a type of supplemental instruction that is given to a deadlocked jury." *Id.* at 275 n.1. "Regardless of the terminology used to

describe the charge that was given," the court of appeals explained, "the state's arguments fail to address, let alone overcome, the fatal flaw of the jury charge in this case: the lack of cautionary language which would discourage jurors from surrendering their own conscientiously held beliefs." *Id.* at 279.[6]

Other courts have reached a similar conclusion in the exercise of their supervisory powers. Four circuits—the First, Fourth, Sixth, and Ninth—have held that a supplemental charge will be deemed coercive in almost any case in which the trial court fails to emphasize, in some fashion, that jurors who favor acquittal should not vote to convict merely to reach a verdict. As then-Judge Kennedy wrote for the Ninth Circuit in *United States v. Mason*, 658 F.2d 1263 (9th Cir. 1981):

> [i]f the cases grappling with *Allen* have a common thread, it is this: the integrity of individual conscience in the jury deliberation process must not be compromised . . . . *It is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party.*

Id. at 1268 (reversing convictions and ordering new trial) (emphasis added).

Similarly, in *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961), the Fourth Circuit reversed a conviction under the

---

[6] The Second Circuit also noted that "[t]he necessity for such cautionary language is highlighted . . . because, as the trial judge was well aware, the jury was divided eleven to one when the supplemental instructions were given." 191 F.3d at 280. This Court has held that a supplemental charge is likely to have greater coercive power where the trial court is aware of how the jury is divided numerically at the time it gives the supplemental charge. *See, e.g., Brasfield v. United States*, 272 U.S. 448, 449 (1926); *Burton v. United States*, 196 U.S. 283, 307 (1905).

federal bank robbery statute, 18 U.S.C. § 2113(b), where the district court, upon learning that the jury was deadlocked, "instructed the jury regarding its duty to agree, but without the ameliorating admonition that no juror should yield his conscientious conviction." 289 F.2d 434. The Fourth Circuit explained that while "[i]t is proper for the judge to admonish jurors who are in disagreement to re-examine their opinions," it must be made "equally clear that the jury's verdict must represent the final judgment of each juror, and not merely his acquiescence in a majority view of which he remains conscientiously unconvinced." *Id.* at 436-37 (quotation and citation omitted). "When the moderating condition which makes [the supplemental charge] permissible . . . is omitted," the Fourth Circuit concluded, "then the direction becomes so likely to be coercive, that a verdict rendered promptly thereafter should not be allowed to stand." *Ibid.*; *see also United States v. Nwaneri*, 74 F.3d 1234, 1996 WL 15468 at * 4 (4th Cir. 1996) (unpublished opinion) (relying on *Rogers* to reverse conviction on ground that supplemental *Allen* charge failed "to advise the jurors not to surrender their honest convictions"); *United States v. Mitchell*, 720 F.2d 370, 371 (4th Cir. 1983) (reversing conviction and citing *Rogers* for proposition that the charge in *Allen* "approached the ultimate permissible limits . . . to which the court should go in suggesting to jurors the desirability of agreement").

The Sixth Circuit reached a similar conclusion in *United States v. Scott*, 547 F.2d 334 (6th Cir. 1977), where the court reversed a conviction under 18 U.S.C. § 871 because the trial court gave a supplemental charge to a deadlocked jury that failed to caution that no juror "should surrender an honest conviction about the case simply because other jurors disagreed." *Id.* at 337. The Sixth Circuit observed that "[a]ny variation upon the precise language approved in *Allen* imperils the validity of the trial" and emphasized that "[t]he reminder that no juror should merely acquiesce in the majority opinion is therefore one of the most important parts of the *Allen* charge." *Ibid.*; *see also United States v.*

Hernandez-Albino, 177 F.3d 33, 38 (1st Cir. 1999) (noting that "[a]ny supplemental instruction in response to a jury's deadlock can have a significant coercive effect," and holding that every anti-deadlock charge must "acknowledge that the jury has the right not to agree").[7]

3. In contrast to the approach taken by these courts, the Fifth and Seventh Circuits, like the Eleventh Circuit in this case, have accepted the contention that a supplemental jury charge to "continue to deliberate" is unproblematic either as a matter of constitutional due process or supervisory power. Those courts have reasoned that such charges are not "traditional *Allen* charge[s]" because they are "content neutral and carr[y] no plausible potential for coercing the jury." *United States v. D'Antonio*, 801 F.2d 979, 983-84 (7th Cir. 1986); *see also United States v. Warren*, 594 F.2d 1046, 1049-50 (5th Cir. 1979); *United States v. Kramer*, 955 F.2d 479, 489 (7th Cir. 1992); *United States v. Thibodeaux*, 758 F.2d 199, 203 (7th Cir. 1985).

Those decisions cannot be reconciled with this Court's cases. Each of the instructions upheld by this Court in jury coercion cases has contained cautionary language. *See Allen*, 164 U.S. at 501; *Lowenfield*, 484 U.S. at 235 (noting that charge instructed jury to "consult with one another . . . [and] discuss the evidence . . . if you can do so without violence to

---

[7] Two other circuits—the Third and District of Columbia—eschew the traditional *Allen* charge altogether in favor of a more neutral version recommended by the American Bar Association. *See United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir. 1969); *United States v. Thomas*, 449 F.2d 1177, 1187 (D.C. Cir. 1971) (*en banc*). The charge adopted by those circuits is tailored to emphasize that jurors need not relinquish their honestly-held convictions simply for the sake of reaching a verdict. A supplemental "anti-deadlock" charge that lacks the requisite cautionary language is often held to be reversible error in those courts. *See, e.g., United States v. Strothers*, 77 F.3d 1389, 1390 (D.C. Cir. 1996); *Government of the Virgin Islands v. Hernandez*, 476 F.2d 791, 794 (3d Cir. 1973).

[your] individual judgment"); *Hyde v. United States*, 225 U.S. 347, 383 (1912) (affirming supplemental charge because trial court "took care to say to the jury that the law would not recognize a coerced verdict, and that . . . if they could not conscientiously and freely agree upon a verdict they would be discharged") (internal quotations omitted). That fact is not a mere coincidence. It is precisely when an impasse is reached that jurors most need to be told that they need not relinquish their sincerely-held views simply to secure a verdict. *See Burton v. United States*, 196 U.S. 283, 307 (1905) ("Balanced as the case [is] in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it [is a situation] where the most extreme care and caution [are] necessary in order that the legal rights of the defendant should be preserved.").

Indeed, absent some strong cautionary language, a supplemental instruction to continue deliberations carries the same coercive effect as the instruction "[y]ou've got to reach a decision in this case," which this Court held to be coercive in *Jenkins*. *See* 380 U.S. at 346. As this Court repeatedly has recognized, "jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985); *see also Richardson v. Marsh*, 481 U.S. 200, 206 (1987). A court that instructs a deadlocked jury to "continue to deliberate" merely leaves implicit what the instruction in *Jenkins* made explicit, namely, that deadlock is inappropriate or unacceptable, and that a verdict *must* be returned. *See also United States v. Gypsum*, 438 U.S. 422, 462 (1978) (trial court's suggestion to foreman that it was desirable that the jury return a verdict justified reversal "*solely* o[n] the *risk* that the foreman believed the court was insisting on a dispositive verdict") (emphasis added). To an attentive jury, however, the message is conveyed just the same. Thus, the Eleventh Circuit was clearly wrong to conclude that the supplemental

instruction was not a coercive "*Allen*" charge simply because "[n]othing in this brief instruction suggested that a particular outcome was either desired or required." App., *infra*, 9a. No jury could fail to appreciate that there was no point to the trial court's instruction other than to eliminate the deadlock and produce a verdict.

4. The Eleventh Circuit's decision thus contributes to an intractable circuit split regarding the propriety of the supplemental jury charge at issue in this case. Because that supplemental charge was indisputably an "*Allen*-type charge," *Smalls*, 191 F.3d at 279-80—*i.e.*, it was directed to a deadlocked jury for the purpose of encouraging it to reach a verdict—it is plain that it would be deemed a due process violation in the Second Circuit and, at a minimum, a violation of proper federal criminal procedure in several courts of appeals.[8] Only review by this Court can decisively resolve this disagreement on a question of federal criminal procedure that affects a vast number of criminal trials.

---

[8] The need for review is heightened, rather than diminished, by the fact that several courts of appeals have addressed the supplemental jury charge at issue here under the rubric of supervisory authority rather than explicitly under the Constitution. As this Court has recognized repeatedly, the exercise of appellate supervisory authority cannot conflict with constitutional commands, *see Thomas v. Arn*, 474 U.S. 140, 148 (1985), and, in any event, even in the absence of constitutional imperatives "supervisory" rules must "represent reasoned exercises of the courts' authority." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244 (1993). Because it would be intolerable for courts of appeals to invoke "supervisory" authority to devise widely divergent trial systems in different regions of the country, this Court has frequently reviewed the propriety of supervisory rules established by the courts of appeals. *See Ortega-Rodriguez*, 507 U.S. at 244; *Thomas*, 474 U.S. at 148; *United States v. Hasting*, 461 U.S. 499, 506-07 (1983); *United States v. Payner*, 447 U.S. 727, 735 (1980).

III. The Decision Below Departs From The Established Tradition That A "Counterfeit" Must Be Similar To A Genuine Original And Interferes With Congress's Enforcement Scheme

Although the Eleventh Circuit admitted that "virtually every court of appeals" construes criminal counterfeiting statutes to require a finding of "similitude" (App., *infra*, 10a (collecting authorities)), the court departed from that uniform course of lower court decisions on the sole ground that the language of 18 U.S.C. § 513 establishes that Congress intended in this statute to depart from that body of authority. Because the Eleventh Circuit's conclusion is belied rather than supported by the text of Section 513 and by applicable canons of construction and the legislative history, that court had no sound or even permissible reason to depart from the established and uniform construction of the federal counterfeiting statutes that concededly is followed by other circuits. Review is needed to restore coherence and uniformity to the approach to counterfeiting offenses that prevailed in the lower courts until the decision below.

1. The plain language of Section 513(c)(1) demonstrates Congress's affirmative intent to incorporate a "similitude" requirement. The statute defines the term "counterfeited" to mean "a document that *purports to be genuine* but is not, because it has been falsely made or manufactured in its entirety." 18 U.S.C. § 513(c)(1) (emphasis added). The phrase "purports to be genuine" necessarily implies a comparison between the alleged forgery and the genuine article. Similarly, the definitional requirement that a counterfeit "is not" genuine necessarily presupposes the existence of a genuine article that the purported counterfeit has attempted, unsuccessfully, to emulate. In its relevant part, therefore, the statute echoes centuries-old definitions of

"counterfeit," which also draw explicit comparisons between a "counterfeit" and the "genuine" original that it imitates.[9]

2. That reading of Section 513 is also compelled by well-established canons of statutory construction. Where, as here, "a common-law principle is well established . . . , the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quotation and citation omitted). Here, far from making "evident" any intent to depart from the common law requirement of similitude, the language of Section 513 affirmatively suggests that Congress intended to *embrace* that requirement.

Indeed, even if the text of Section 513 did not affirmatively invite the comparison that was required at common law, Congress's use of the traditional terminology of counterfeiting offenses—"counterfeit" and "genuine"—would be sufficient by itself to incorporate that requirement into Section 513. This Court has long recognized that "when Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word.'" *Beck v. Prupis*, 120 S. Ct. 1608, 1614 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). In such cases, this Court has explained, the "'absence of contrary direction may

---

[9] *See* 3 *Oxford English Dictionary* 1027 (2d ed. 1989) ("to make (anything) in fraudulent imitation of something else; to make or devise (something spurious) and pass it off as genuine"; quoting examples of this usage dating back to the fourteenth century); 1 John Bouvier, *A Law Dictionary* 246 (1839) ("To make something false in the semblance of that which is true"); *see also Black's Law Dictionary* 349 (6th ed. 1990) (defining "counterfeit" as "to copy or imitate, without authority or right, and with a view to deceive or defraud, by passing the copy or thing forged for that which is original or genuine"); *Black's Law Dictionary* 315 (5th ed. 1979) (same).

be taken as satisfaction with widely accepted definitions, not as a departure from them.'" *Ibid.* That interpretive principle is dispositive here.

The legislative history confirms that Congress intended to incorporate a similitude requirement in Section 513. The Senate Report that accompanied the legislation expressly states that the statutory definition of "counterfeited" was intended to "*carry forward* the general view that, in order for an article to be counterfeit, it need only bear such likeness or resemblance to the genuine article as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest." S. REP. NO. 97-307, at 775-76 (1981). This makes the Eleventh Circuit's reading of Section 513 all the more remarkable and impermissible, since it demonstrates that the court of appeals openly flouted Congress's purpose in the service of a blinkered conception of the words' plain meaning. As this Court recently observed, courts have an "obligation to . . . give effect to congressional purpose so long as the congressional language does not itself bar that result." *Johnson v. United States*, 120 S. Ct. 1795, 1805 n.10 (2000).

3. The Eleventh Circuit's decision also interferes with Congress's carefully-crafted enforcement scheme. In fact, the decision effectively nullifies the operative effect of 18 U.S.C. § 514, a provision of the United States Code that immediately follows the statute at issue in this case. Section 514, which is entitled "Fictitious obligations," criminalizes the making, passing, or uttering of

> any false or *fictitious instrument*, document, or other item appearing, representing, *purporting*, or contriving through scheme or artifice, *to be an actual security* or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization.

Id. § 514(a) (emphases added). Of course, this is what Prosperi is alleged to have done: to have created a wholly fictitious instrument that purported to be an actual security, even though no such security existed. App., *infra*, 14a-15a. Notably, unlike Section 513, Section 514 contains no references to "counterfeit[ing]" or to "genuine" originals.[10]

The intended relationship between Sections 513 and 514 is made plain by the legislative history of Section 514. In 1995, Senator D'Amato introduced a bill containing language identical to what later became Section 514. *See* Financial Instruments Anti-Fraud Act of 1995, S. 1009, 104th Cong. § 3. He explained that his bill proposed a new crime that would "close[] a loophole in Federal counterfeiting law." 141 CONG. REC. S9534 (daily ed. June 30, 1995). The loophole that Senator D'Amato described was the failure of any of the counterfeiting provisions in title 18 to apply when "fictitious instruments are not counterfeits of any *existing negotiable instrument*." *Id.* at S9533 (emphasis added).[11]

[10] Section 514 explicitly incorporates several of Section 513's definitions, *id.* § 514(b), thus demonstrating that those two sections should be construed *in pari materia*.

[11] The Eleventh Circuit feared that accepting Prosperi's argument would "license counterfeiters to create fictitious documents with impunity." App., *infra*, 17a. In fact, as Senator D'Amato's statement demonstrates, that is what Congress had inadvertently allowed to happen before it enacted Section 514. Of course, even before that loophole in the federal counterfeiting statutes was closed, the creation of fictitious documents could be punished as securities fraud, or wire or mail fraud. *See, e.g., SEC v. Lauer*, 52 F.3d 667, 669 (7th Cir. 1995) (purported investment in "'Prime Bank Instruments,' a non-existent high-yield security" subject to securities fraud provisions); *First Nat'l Bank v. Russell*, 657 F.2d 668, 673 n.16 (5th Cir. 1981) (SEC has jurisdiction even if "security purportedly traded is nonexistent or fictitious"). Here, the Government's attempt to charge Prosperi with mail fraud fell quite short of producing legally sufficient evidence, justifying the trial court's decision to enter a judgment of acquittal on those counts.

When Congress later enacted Section 514—on September 30, 1996, well *after* Prosperi allegedly committed the "counterfeiting" offenses for which he was convicted, *see* Pub. L. No. 104-208, 110 Stat. 3009-367, -470 (1996)—it clearly intended to fill that gap.

Yet in holding that Section 513 creates a novel form of "counterfeiting" that applies even where there is no genuine original to be copied, the Eleventh Circuit effectively determined that the statutory gap Congress understood itself to be filling with Section 514 did not exist. Because in so ruling the Eleventh Circuit also concededly departed from the uniform construction given to federal counterfeiting statutes by the lower federal courts (App., *infra*, 11a), the Eleventh Circuit's decision warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MIGUEL A. ESTRADA
ANDREW S. TULUMELLO
CURTIS E. GANNON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

June 2000